

Federal Tort Claims Act Coverage for Urban Indian Organizations - Questions & Answers

Updated April 4, 2023

The information in this document is for informational purposes only and is not intended to provide legal advice to any Urban Indian Organization (UIO) or individual. Whether a health care provider is covered under the Federal Tort Claims Act (FTCA) is a complex matter. We urge you to consult with your own legal advisor before taking any action. It is important to keep in mind as you read the frequently asked questions (FAQs) below that the Department of Health and Human Services (HHS) does not determine the scope of coverage under the FTCA. Whether the FTCA applies in any particular case is decided on an individual case-by-case basis by the United States Department of Justice (DOJ) and subsequently by the Federal Courts. These FAQs will be updated, as needed, from time to time as a result of decisions from DOJ and Federal Courts, as well as when new questions arise.

1. What is the FTCA?

Response (04/23/21): The FTCA is the federal law that allows parties claiming to have been injured by certain tortious actions of federal employees and other persons as authorized by Congress acting within the scope of their federal duties to present claims for property damage, personal injury, and/or wrongful death to the federal agency or agencies involved in the incident. The FTCA also provides authority for the federal government to defend against such claims. On January 5, 2021, Congress amended 25 U.S.C. § 5321(d) to extend the FTCA coverage to UIOs and their employees to the same extent and in the same manner as to Indian Self-Determination and Education Assistance Act (ISDEAA) contractors and compactors.

2. What is the effective date of the FTCA coverage?

Response (04/23/21): The Act extending FTCA for certain personal injury claims to UIOs and their employees by deeming them to be part of the Public Health Service is effective beginning on the date of enactment, January 5, 2021.

3. Will there be a deeming process like the Health Resources and Services Administration (HRSA) funded Community Health Centers?

Response (04/23/21): No. For the purpose of FTCA coverage, a UIO with an Indian Health Care Improvement Act (IHCA) contract or grant and its employees are deemed a part of the Public Health Service if acting within the scope of their employment in carrying out the contract.

4. What coverage does FTCA provide for UIOs?

Response (updated 04/04/23): FTCA provides coverage for certain tortious acts or omissions resulting from the performance of medical, surgical, dental, or related functions, or operation of an emergency motor vehicle, subject to exceptions as set forth in 28 U.S.C. § 2680, committed by a covered employee or individual that occurred within the employee's scope of official duties (i.e., employment or contract). Tortious acts or omissions that occur after hours or offsite are usually not covered by the FTCA unless part of one's official duties. The FTCA does not provide coverage for intentional or deliberate torts, such as battery or fraud. This Act covers medical, dental, pharmaceutical, and behavioral health counseling related health care services including ancillary services provided to eligible Urban Indians pursuant to grants and contracts awarded by the Indian Health Service (IHS), under 25 U.S.C. Subchapter IV – Health Services for Urban Indians, of the IHCA.

5. Who is covered by the FTCA generally?

Response (04/23/21): Federal employees acting within the scope of their federal duties are covered by the FTCA. However, Congress has extended coverage to UIOs and its employees. Therefore, it is likely that the following individuals would be covered by the FTCA if acting within the scope of their employment pursuant to the IHCIA contract or grant with IHS:

- Urban Indian Organization Employees
- Urban Indian Organization Board Members and Officers
- Personal Services Contractors, if the service is provided in a UIO facility

The following individuals would likely not be covered by the FTCA:

- Volunteers
- Students and Residents
- Independent Contractors
- Subcontractors/Subgrantees

However, it is not always clear who is covered or not by the FTCA. Whether the FTCA applies in any particular case is decided on an individual case-by-case basis by the DOJ and subsequently by the Federal Courts.

6. Does FTCA cover employees of the UIO who are paid by the UIO from funds other than those provided through the IHCIA contract or grant?

Response (04/23/21): Yes, as long as the services out of which the claim arose were performed in carrying out the IHCIA contract or grant.

7. Are federal employees assigned to a UIO under the Intergovernmental Personnel Act or detailed under section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?

Response (04/23/21): Yes.

8. What is the scope of coverage for onsite activities, alternate care sites, and activities outside of the four walls of the UIO facility? Does coverage extend to our providers outside of the facility, e.g., outreach at schools, mobile COVID testing and vaccine events?

Response (04/23/21): FTCA coverage extends to UIOs and its employees acting within the scope of their IHCIA contract or grant with IHS. Therefore, in order to receive FTCA coverage for any offsite activities, those activities and locations should be clearly within the scope of the IHCIA contract or grant with the IHS and within the defined duties of the UIO employee. Note that personal services contractors will only be covered if performing services within the facility.

9. Does this cover services provided to non-beneficiaries to the same extent and in the same manner as to ISDEAA contractors and compactors?

Response (updated 02/24/22): The extension of FTCA coverage under this provision is limited to services provided to eligible Urban Indian patients, as defined by the IHCIA and the UIO's contract with IHS. It does not cover services to other individuals. Therefore, UIOs should consider private malpractice insurance and in the case of UIOs that are also HRSA funded Health Center Program

grantees, FTCA coverage provided under 42 U.S.C. § 233(g)-(n), may be applicable.

Tribes are similarly only receiving FTCA coverage for activities within the scope of their ISDEAA contract with IHS and to individuals they are authorized to serve pursuant to that contract. Since Tribes are specifically authorized to serve non-beneficiaries pursuant to 25 U.S.C. § 1680c, FTCA coverage extends to serving those non-beneficiaries if the Tribe is doing so pursuant to the terms of their contract. Note also that Urban Indian eligibility varies slightly from eligibility for IHS services.

10. What occurs when a claim is filed?

Response (04/23/21): FTCA claims presented to HHS that involve allegations of tortious conduct by UIOs or its employees will be processed by the Office of General Counsel's (OGC) General Law Division, Claims and Employment Law Branch, which houses the HHS OGC Claims Office. FTCA claims must be presented to OGC's Claims Office in Washington, D.C. Upon receipt of a claim, the Claims Office will request relevant supporting documents and provider/witness contact information needed to fully investigate the claim.

11. Is there a deadline for filing FTCA claims?

Response (04/23/21): Yes. Claims shall be filed within two years of the injury or the date on which the claimant discovers the injury (date of accrual). For example, in a retained instrument of surgery claim, the date of accrual is the date on which the claimant discovered the retained instrument, not the date of the surgery.

12. How long does the federal government have to process an FTCA claim after the claim is received by the federal agency, before a lawsuit may be filed?

Response (04/23/21): Six months.

13. To what extent shall the UIO cooperate with the federal government in connection with tort claims arising out of the UIO's performance?

Response (04/23/21):

- a. The UIO shall designate an individual to serve as tort claims liaison with the federal government (i.e., HHS OGC and, when applicable, DOJ).
- b. As part of the notification required by 28 U.S.C. 2679(c), the UIO shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the UIO or any of its employees that relates to performance of the UIO's contract or grant. Notification can be sent via email to hhs-ftca-claims@hhs.gov.
- c. The UIO, through its designated tort claims liaison, shall assist the HHS OGC Claims Office by providing the information and documentation requested within 30 days of notification of the filing of the tort claim.
- d. The UIO shall cooperate with and provide assistance to IHS Risk Management, HHS OGC, and DOJ attorneys assigned to defend the tort claim if it goes into litigation, including, but not limited to, case preparation, discovery, and trial.

14. What types of documentation is needed from the UIO?

Response (04/23/21): The relevant supporting documents may include medical records,

employment verification documents, a copy of the UIO's contract or grant with IHS, and other relevant information that may be requested.

15. Who reviews the clinical peer reviews of medical malpractice tort claims filed against the federal government that involve care provided at UIOs?

Response (04/23/21): The IHS Risk Management Program is responsible for coordinating the clinical peer reviews of all medical malpractice tort claims filed against the federal government that involve care provided at facilities operated by UIOs carrying out a contract or grant pursuant to the IHCA. If you have any questions or need additional information on the IHS Risk Management Program, Dr. Paul Fowler can be reached at (301) 443-6372 or by e-mail at paul.fowler@ihs.gov.

16. What should a UIO or a UIO's employee do upon receiving such a claim, or a summons/complaint filed in state court? If the UIO, or an employee, receives a summons and/or a complaint alleging a tort covered by FTCA, what should they do?

Response (04/23/21): Any of these documents should be immediately forwarded to the HHS OGC Claims Office via email to hhs-ftca-claims@hhs.gov; notify the UIO's tort claims liaison; and mail the hard copy documents to the HHS Office of the General Counsel, General Law Division, Claims Office, 330 C Street, S.W., Suite 2100, Washington, DC 20201.

17. For UIOs that also receive HRSA funding, would an IHS scope of services supersede or supplement services in the HRSA scope of services? Would UIOs have to report to both agencies, e.g., risk management programs?

Response (04/23/21): No. HHS OGC will make a determination on each tort claim on whether it should be classified as a HRSA or IHS tort claim, and the UIO will be advised accordingly.

18. Who decides the outcome of claims?

Response (04/23/21): The DOJ ultimately decides the outcome of claims. The DOJ settles cases in accordance with what is in the best interest of the federal government. Generally, each malpractice case is defined by its unique facts and that will dictate whether there will be FTCA coverage for a particular act of negligence, reporting to the National Practitioner Data Bank, or whether there will be a report filed with a licensing board or other federal or state oversight authority.

19. How are claims paid?

Response (04/23/21): FTCA settlement payments and judgments in excess of \$2,500 are paid from the Department of Treasury's Judgment Fund. Settlements and judgments \$2,500 and under are paid by the IHS.

20. Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from performance under an IHCA contract or grant?

Response (04/23/21): Yes. No claim compensable under the FTCA may be filed against a UIO or its employees. All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

21. May persons who are not American Indians or Alaska Natives assert claims under FTCA?

Response (04/23/21): Yes. Anyone may assert a claim under the FTCA.

22. How should claims arising out of the performance of medical related functions be filed?

Response (04/23/21): Claims should be filed on Standard Form 95 (Claim for Damage, Injury or Death) or by submitting comparable written information (including a definite amount of monetary damage claimed) with the HHS Office of the General Counsel, General Law Division, Claims Office, 330 C Street, S.W., Suite 2100, Washington, DC 20201.

23. Does the FTCA apply to non-medical related tort claims against UIOs?

Response (updated 04/04/23): No. The authority extending FTCA coverage to UIO contractors only applies to claims resulting from the performance of medical, surgical, dental, or related functions, or operation of an emergency motor vehicle. Non-medical related tort claims arising out of the performance of a UIO contract or grant will not be covered by the FTCA.

24. Do UIOs need to be aware of areas which FTCA does not cover?

Response (updated 04/04/23): Yes. You should anticipate that there will be claims against UIOs that will not be covered by FTCA, claims that are not compensable under FTCA, and remedies that are excluded by FTCA. General guidance is provided below as to these matters but is not intended as a definitive description of coverage, which is subject to review by the DOJ and the Federal Courts on a case-by-case basis.

- (a) What claims are expressly barred by FTCA and therefore cannot be made against the United States or UIOs? Claims including those arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h). Please note, however, that under 42 U.S.C. 233(e), the assault and battery exclusions set forth in 28 U.S.C. 2680(h) do not apply to claims for assault and battery arising out of negligence during a medical, dental, surgical, or related function.
- (b) What claims may not be pursued under FTCA? (1) Claims against subcontractors arising out of the performance of subcontracts with a UIO; (2) Claims covered by workers' compensation; (3) Claims for breach of contract rather than tort claims; or (4) Claims resulting from activities performed by an employee that are outside the scope of employment or contract with the government.
- (c) What remedies are expressly excluded by FTCA and therefore are barred? (1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and (2) Other remedies not permitted under applicable state law.
- (d) What claims are compensable under the FTCA for Tribes and Tribal Organizations with ISDEAA contracts but are not compensable for UIO contractors? Only claims against UIO contractors resulting from the performance of medical, surgical, dental, or related functions, or operation of an emergency motor vehicle are compensable. In contrast, pursuant to section 314 of Public Law No. 101-512, non-medical related tort claims against ISDEAA

contractors are also compensable under the FTCA.

25. Will the UIO contract include any clauses about FTCA coverage?

Response (updated 02/24/22): Yes. The following language will be included in UIO contracts:

Federal Tort Claims Act.

- (a) Generally. For purposes of Federal Tort Claims Act (FTCA) coverage, the UIO is deemed to be part of the Public Health Service in the Department of Health and Human Services and its employees are deemed to be employees of the Federal government while performing work under this contract.
- (b) Case-by-Case Determination. The IHS does not determine the scope of coverage under the FTCA. The UIO understands that whether the FTCA applies in any particular case is decided on an individual case-by-case basis by the United States Department of Justice (DOJ) and subsequently by the Federal Courts.
- (c) Records. Should the FTCA apply to a claim against or in litigation involving the UIO or its employees, the UIO will promptly provide all documents necessary for the defense of such case. All such documents, and any related documents, shall be preserved throughout the pendency of the claim, case, and all appeals. The UIO shall designate one individual to be its FTCA point of contact to assist with these requests, and shall inform IHS of any changes to that contact.

26. Does FTCA apply to an IHClA contract if FTCA is not referenced in the contract?

Response (04/23/21): Yes, but see Response 25.